SINGAPORE REPORTS

AMOS W. DAWE v. MOSCOW NARODNY BANK LTD.

[C.A. (Chua, Choor Singh & Rajah JJ.) August 16, 1977]
[Singapore — Civil Appeal No. 26 of 1976]

Practice and Procedure — Summary judgment — Conditional leave given on payment of sum claimed in court — Triable issues — Leave to defend — R.S.C., 1970, O.14.

The respondent bank had sued the appellant for the sum of $6,237,500 on a written guarantee given by the appellant to the bank in respect of the overdraft account of Raja Enterprise Ltd. with the respondent bank. On an application under Order 14, the Registrar had given the appellant conditional leave to defend upon the appellant paying into court within fourteen days the sum claimed. The appeal of the appellant was dismissed in the High Court and he appealed to the Court of Appeal. The appellant alleged that the guarantee was given as part of an arrangement for the take-over of various companies and was given on the understanding that that it would not be effective or operative or enforceable until his consent or approval had first been obtained.

Held, allowing the appeal: it was clear that there were a number of triable issues both of fact and of law in this case and the appellant should be allowed to defend the action unconditionally.

COURT OF APPEAL.

Francis T. Seow for the appellant.

Tan Kok Quan for the respondents.

Chua J. (delivering the judgment of the Court): The respondent bank sued the appellant, Amos W. Dawe, for $6,237,500 the equivalent of US$2,500,000 on a written guarantee given by the appellant to the respondent bank in respect of the overdraft account of Raja Enterprises Ltd. with the respondent bank.

On an Order 14 application for judgment the Registrar gave conditional leave to defend upon the appellant paying into court within fourteen days the sum claimed. The appellant appealed and the learned Chief Justice dismissed the appeal. The appellant appealed to this court. At the end of the hearing of the appeal we allowed the appeal and said that we would give our reasons later. We do so now.

The following facts are not in dispute. In December, 1972, the respondent bank lent to Raja Enterprises Ltd. the sum of US$2,500,000 for a period of one year upon the security, *inter alia,* of a personal guarantee (marked "HTF 2") of up to US$2,500,000 of one Tan Sri Khoo Teck Puat (Tan Sri Khoo). Subsequently, negotiations were carried out between the appellant, on behalf of the Mosbert Group of Companies of which he was the Chairman, and Tan Sri Khoo, with the full knowledge of the respondent bank, resulting in an agreement between them in regard to a Mosbert take-over of the Raja Enterprises Ltd. on terms and conditions, *inter alia,* that upon completion thereof the respondent would release Tan Sri Khoo of his obligation under the guarantee HTF 2 and that in substitution for the guarantee HTF 2 the appellant was to give a guarantee to the respondent bank in similar terms as the guarantee HTF 2. Subsequently the appellant executed the guarantee (marked "NPL-1") and left it with the respondent bank. The respondent bank's claim against the appellant is on this guarantee NPL-1.

According to the appellant, sometime in 1973 Tan Sri Khoo proposed a take-over of Raja Enterprises Ltd. by Mosbert Holdings Ltd., in exchange for shares in Mosbert Holdings Ltd. Negotiations then began between the two of them and extended to the take-over of the following companies of which Tan Sri Khoo was directly or indirectly the beneficial owner viz:

(i) Daiwa (Malaya) Pte. Ltd.,

(ii) Printers & Converters Pte. Ltd.

(iii) National Laundry Services (Pte) Ltd.
(The abovementioned three companies are hereinafter collectively called the Daiwa Complex) and

(iv) Six bungalows at Pasir Panjang Road, Singapore.

It was finally agreed between them that:—

(a) Raja Enterprises Ltd., the Daiwa Complex and the six bungalows were to be part and parcel of the entire take-over and each was conditional upon the other being successfully completed;

(b) the consideration for the sale of the shares in Raja Enterprises Ltd. to Mosbert Holdings Ltd. was to be Hong Kong $36,000,000 which was to be satisfied by the delivery of 17,823,528 ordinary shares of H.K.$1 each in Mosbert Holding Ltd., which thereby made or would have made Tan Sri Khoo or his nominees the second largest shareholder in Mosbert Holdings Ltd. This consideration was subsequently varied by Tan Sri Khoo in October, 1973. who proposed, *inter alia,* the return of the said 17,823,528 Mosbert Holding shares valued at $16,000,000 to the Mosbert Group and on receipt of the $16,000,000 Tan Sri Khoo would through his Company known as National Holdings Ltd. discharge the indebtedness of Raja Enterprises Ltd. with the respondent bank for a loan of US$2,500,000;

(c) Tan Sri Khoo's guarantee HTF 2 was to continue until the successful completion of the entire take-over after which, subject to the approval of the respondent bank, the appellant was to release Tan Sri Khoo from the guarantee HTF 2, and another guarantee referred to in (d) below;

(d) the consideration for the purchase of the Daiwa Complex and the six bungalows was to be $18,025,000 and $1,650,000 respectively to be paid in cash and appellant undertook to release Tan Sri Khoo from the guarantee HTF 2 and another guarantee signed by Tan Sri Khoo in favour of the respondent bank for the sum of US$5,000,000. This consideration was subsequently varied in April, 1975.

The above negotiations were conducted with the full knowledge of the respondent bank which agreed in principle to finance the entire take-over.

After the said agreement was reached he signed the guarantee NPL-1 and a blank guarantee for US$5,000,000 in anticipated substitution for Tan Sri Khoo's two guarantees in favour of the respondent bank, namely HTF 2 for $2,500,000 and a guarantee for $5,000,000, and left them with P.K. Teo, the business adviser and manager of the respondent bank, on the express understanding that they were not to be used by the respondent bank without his prior consent and/or approval and/or authority and unless and until the proposed Mosbert take-over by the respondent bank had been successfully completed. NPL-1 was subsequently dated the 21st February, 1975, by the respondent bank without his knowledge. However, as a result of delays by the respondent bank and/or Tan Sri Khoo owing to a number of factors, the entire take-over came to a standstill which contributed in no small measure to the detriment and final collapse of the Mosbert Group. Contrary to the understanding that he had with P.K. Teo, however, he was not and

has never been consulted and/or told by the respondent bank or P.K. Teo that the respondent bank had discharged Tan Sri Khoo from his liabilities under the guarantee and/or had accepted him in place thereof as a guarantor. He did not at any time consent and/or approve and/or authorise the use of the guarantee NPL-1 as Tan Sri Khoo, as the respondent bank well knew, had not fulfilled his obligations under the said agreement thus aborting the said take-over.

Because of the nature and extent of the activities of the Mosbert Group of Companies, he had perforce to travel overseas on numerous occasions for periods of time. In the circumstances, and because of the cordial relationship then existing between himself and P.K. Teo he signed at the request of P.K. Teo a number of blank and undated guarantees and left them with him on the understanding that the same or any of them were not to be effective or operative or enforceable until his consent and/or approval had first been obtained. The respondent bank was then the principal bankers of the Mosbert Group of Companies.

According to the respondent bank it was agreed between the respondent bank, the appellant and Tan Sri Khoo that upon the Mosbert Group taking over Raja Enterprises Ltd. the respondent bank would release Tan Sri Khoo of his obligation under the guarantee HTF 2 and that the said release would only be given to Tan Sri Khoo at the expiry of the loan period i.e. on December 14, 1973. In anticipation of the take-over by the Mosbert Group of Raja Enterprises Ltd. the appellant then executed the guarantee NPL-1 and left it with the bank. There was no stipulation that the guarantee NPL-1 was not to be used by the bank without the appellant's prior consent and/or approval and/or authority. On December 13, 1973, Tan Sri Khoo wrote to the respondent bank in these terms — (Letter marked HTF 5):—

"Re Raja Enterprises Ltd.

As I have informed you, the above company has been sold to Mr. Amos Dawe.

I do not accept any further responsibility for the Company's borrowings secured by the land in Tampoi and as agreed. the guarantee signed by me is to be treated as cancelled."

Pursuant to the said agreement the respondent bank released Tan Sri Khoo of his obligation under the guarantee HTF 2 on or about December 13, 1973, and the appellant's guarantee NPL-1 was substituted for the guarantee HTF 2. On March 19, 1975, in consideration of the respondent bank extending the period of repayment of the loan by Raja Enterprises Ltd. the directors of Raja Enterprises Ltd. gave the respondent bank a further guarantee up to the limit of US$2,500,000 (marked "KYM 8"). This guarantee was signed by the appellant as one of the directors of Raja Enterprises Ltd.

The appellant, however, said that it was not true that it was in consideration of the respondent bank extending the period of repayment of the loan that the directors of Raja Enterprises Ltd. gave the respondent bank the further guarantee KYM 8, dated March 19, 1975. The appellant explained that the loan was a rollover loan; that no notice of demand was sent to and/or received by him and/or Raja Enterprises Ltd. and, in any event, the loan was not due for repayment on or about March 19, 1975; that, moreover his guarantee NPL-1 was a continuing guarantee and there was, therefore, no necessity in law or otherwise for a further guarantee to be executed in respect of the same loan.

The appellant said that at or about that time the respondent bank was being investigated by a team of internal auditors from the respondent's head office in London and, in the result, the respondent bank approached him to obtain the signatures of the directors of Raja Enterprises Ltd. to a blank guarantee, which was only to be used by the bank as a form of window-dressing, if and when the auditors were to inquire into Raja Enterprises Ltd.'s account with the respondent bank, and which was subsequently to be returned to him for destruction. He was reluctant to accede to this unbankerlike request but in order to preserve the cordial relations then existing between them, he agreed. It was on this basis that he procured and handed over to the respondent bank the further guarantee KYM 8. The particulars in the further guarantee KYM 8 were later typed and/or filled in by the respondent bank which on this occasion put Raja Enterprises' address as Room 709-710 Alexander House, Hong Kong, which was not its real address as Alexander House had been demolished or was in the course of demolition in 1972/73.

The respondent bank said that the take-over by the Mosbert Group of Raja Enterprises Ltd. was not abortive. The bank produced documents showing that the Mosbert Finance Nominees Ltd. were on March 22, 1973, the Registered Holder of two fully paid shares of $1 each in the Raja Enterprises Ltd. and that Mosbert Holding Ltd. were on October 8, 1973, the Registered Holder of 41,199,958 fully paid shares of $1 each in the Raja Enterprises Ltd.

The respondent bank alleged that the appellant had absconded from Singapore and is now somewhere in Bangkok and would not return to Singapore to defend this action if this action proceeds to trial. The appellant had filed two affidavits in this matter both sworn at Bangkok, one on June 22, 1976, and the other July 13, 1976, and denied that he had absconded from Singapore. He stated that it was the respondent bank which insisted prior to the collapse of the Mosbert Group that he should resign as Chairman of the Mosbert Group and stay out of Singapore so as to enable the respondent bank to, *inter alia*, appoint their nominees on to the Board of the Mosbert Holdings Ltd. and its other subsidiaries and to negotiate with the new Board of Directors the over-all finance for the Mosbert Group. In compliance therewith, he stayed out of Singapore and, in the meantime, he had established or would be establishing some businesses which required his constant and continued attention and presence abroad and that it was his intention to return to Singapore for the trial of this action.

The learned Chief Justice said in his Grounds of Decision:

"The defendant admitted signing the guarantee but alleged that it was handed over to a servant or agent of the plaintiff bank on the express understanding that it was not to be used by the bank without the defendant's prior consent and or approval and/or authority and unless and until a proposed

takeover of Raja Enterprises Ltd. by a company under the control of the defendant had been completed. This allegation is contained in an affidavit of the defendant sworn at Bangkok to which place the defendant is alleged to have absconded from Singapore.

In the circumstances I was of the opinion that the order of the Registrar was correct and I dismissed the appeal with costs."

The appellant complained that the learned Chief Justice had ignored the facts which he had set out in his affidavits which established the existence of several triable issues but had come to his decision that the order of the Registrar was correct solely on the ground that the appellant had absconded from Singapore.

The appellant said that the letter HTF 5 which the respondent bank said they received from Tan Sri Khoo was bogus and had been fabricated and he challenged its authenticity. The appellant said that if it was true that Tan Sri Khoo was released from his guarantee HTF 5 on or about December 13, 1973, as alleged by the respondent bank, he would not have written to Tan Sri Khoo the letter dated January 7, 1975, (AWD 2) undertaking to release the two guarantees — HTF 2 and the US$5,000,000 — signed by Tan Sri Khoo in favour of the respondent bank, and there would have been no necessity for Tan Sri Khoo to have written to him on April 19, 1975, (AWD 4) reminding him of his undertaking to obtain the release of the two guarantees HTF 2 and the one for US$5,000,000. The appellant said that if the respondent bank's intention was true that Tan Sri Khoo was released from his guarantee HTF 5 on or about December 13, 1973, then apparently the loan was not secured for a period of over one year as his guarantee NPL-1 was dated February 21, 1975, a most unlikely event.

The appellant said that the respondent bank had no right to release Tan Sri Khoo from his guarantee without his and/or Raja Enterprises Ltd.'s concurrence and/or approval and if, in fact, Tan Sri Khoo was so released, then it was as a result of collusion between the respondent bank and Tan Sri Khoo and was in clear violation or in flagrant breach of the agreement reached between Tan Sri Khoo and himself, of which the respondent bank knew or was fully aware.

Counsel for the appellant submitted that a question of law arose as regards the second guarantee KYM 8 executed by the Directors of Raja Enterprises Ltd. What is the legal effect of this second guarantee? Would it supersede the first guarantee NPL-1? It was pointed out that the appellant was at first sued on the second guarantee KYM 8. The Statement of Claim was subsequently amended and the appellant is now sued on the first guarantee NPL-1.

It is clear that there are a number of triable issues both of fact and law and the appellant should be allowed to defend this action unconditionally. We were of the view that in the light of all the circumstances if the respondent bank should get judgment at all it should be after a full hearing. We therefore allowed the appeal.

Appeal allowed.

Solicitors: *Francis T. Seow; Lee & Lee.*

RE SUNSHINE SECURITIES (PTE) LTD.; SUNSHINE SECURITIES (PTE) LTD. & ANOR. v. OFFICIAL RECEIVER AND LIQUIDATOR OF MOSBERT ACCEPTANCE LTD.

[C.A. (Wee Chong Jin C.J., Chua & Rajah JJ.) September 30, 1977]

[Singapore — Civil Appeal No. 42 of 1976]

Companies — Winding up — Admission of debt — Subsequent letter without prejudice asking for particulars of debt — Inability to pay debts — Evidence Act (Cap. 5), s. 23 — Companies Act (Cap. 185), s. 218.

Evidence — Admission of debt — Subsequent letter without prejudice asking for particulars of debt — Evidence Act (Cap. 5), s. 23.

This was an appeal from an order made in a winding up petition. The respondents, the liquidator of Mosbert Acceptance Ltd. had written to the appellant demanding payment of a debt of HK$529,054.97. The first appellant by its solicitors' letter admitted the debt and asked for two months to pay. Subsequently the first appellant's solicitor wrote a "without prejudice" letter asking for particulars of the debt. The respondent through his solicitors refused to grant the two months' extension and demanded payment. No reply was given to the first appellant's further request for particulars. The respondent subsequently filed a petition for winding up and an order was made accordingly. The appellants appealed.

Held, dismissing the appeal: (1) having regard to the clear and unequivocal admission of the petitioner's debt contained in the first letter the learned judge was entitled to come to the conclusion that there was no *bona fide* dispute;

(2) as the company had failed to pay or give security for the debt for which a statutory demand had been made, it was insolvent and may be wound up.

Cases referred to:-

(1) *Peacock* v. *Harper* 26 W.R. 109.

(2) *Re Welsh Brick Industries, Ltd.* [1946] 2 All E.R. 197, C.A.

COURT OF APPEAL.

Francis T. Seow for the appellants.

Tan Kok Quan for the respondent.

Rajah J. (delivering the judgment of the Court): This is an appeal arising out of an Order made by Choor Singh J. in the above Winding Up Petition.

The abovenamed first appellant is a company incorporated in Singapore in 1969 under the Companies Act and has its registered office at Room 1506, 15th Floor High Street Centre, North Bridge Road, Singapore. The nominal capital of the company is $1,000,000 divided into 1,000,000 ordinary shares of $1 each. The amount of the capital paid up or credited as paid up is $2. The shareholders of the Company are two in number, one being the second appellant and the other being one Low Seow Nam. The main object of the company was to act as attorneys, nominees, agents, receivers, managers and trustees.

On April 14, 1976 the Supreme Court of Hongkong ordered that Mosbert Acceptance Ltd., a company incorporated in Hongkong, be wound up and appointed the Official Receiver and Liquidator in Hongkong the liquidator thereof, the respondent herein. A first examination of the books of the company showed that the first appellant was indebted to the Hongkong company in the sum of HK$529,054.97 in respect of loans and advances made by it to the first appellant.